

COURT OF APPEAL FOR ONTARIO

The Honourable Madam)
Justice Feldman, J.A.)

Dated the 7th day
of December, 2011

(Court seal)

B E T W E E N:

**ANDREW KEEWATIN JR. and
JOSEPH WILLIAM FOBISTER on their own behalf and on
behalf of all other members of GRASSY NARROWS FIRST NATION**

**Plaintiffs
(Respondents)**

- and -

MINISTER OF NATURAL RESOURCES

**Defendant
(Appellant)**

- and -

ABITIBI-CONSOLIDATED INC.

**Defendant
(Appellant)**

- and -

THE ATTORNEY GENERAL OF CANADA

**Third Party
(Appellant)**

ORDER

THESE MOTIONS, made by the appellant Minister of Natural Resources (the "Minister") for a stay, pending the outcome of these appeals, of the judgment of the Honourable Justice M.A. Sanderson dated August 16, 2011, and by the respondents for

an order for interim costs of these appeals, were spoken to by counsel for the parties this day at Toronto, Ontario.

ON READING the motion record seeking a stay pending appeal delivered on behalf of the Minister, and the respondents' notice of motion and supporting affidavit seeking interim costs, and upon being advised by counsel for the parties of the parties' consent to an order on the following terms, except that the Attorney General of Canada does not consent to the relief set out in paragraphs 5 and 6, but does not oppose the granting of that relief:

1. THIS COURT ORDERS that the judgment of the Honourable Justice M.A. Sanderson is hereby stayed pending the determination of this appeal.
2. THIS COURT FURTHER ORDERS that while the stay provided for by paragraph 1 of this order is in effect, the Minister shall not undertake, or provide authorization for any other person to undertake, the harvesting of trees for subsequent sale or other commercial purposes, other than for firewood, within the area illustrated on the map attached as Schedule A to this order and labelled as the "Whiskey Jack Forest north of the English River", without the consent of the Grassy Narrows First Nation.
3. THIS COURT FURTHER ORDERS, for greater clarity, that:
 - a) Although the determinations of the trial judge have no legal consequence while the stay provided for by paragraph 1 of this order is in effect, this order shall not be construed as staying, altering, affecting or reducing the rights

set out in Treaty 3, or the scope of the Crown's duty to consult with respect to those rights and potentially accommodate those rights; and

- b) This order does not limit the ability of the Minister to consult with or seek the agreement of any other First Nation community whose asserted traditional land use area may overlap with the area referenced in paragraph 2 above.
4. THIS COURT FURTHER ORDERS that the Minister shall pay the respondents' costs incurred in relation to the Minister's stay motion, on a partial indemnity basis. Those costs shall be quantified by agreement between the respondents and the Minister, or failing agreement, through the fixing of those costs by this court, and shall be paid within thirty days following their quantification.
5. THIS COURT FURTHER ORDERS that the Minister and the Attorney General of Canada ("Canada") shall pay the respondents' costs of these appeals, on a partial indemnity basis, in advance and in any event of the cause, subject to the terms of paragraph 6 below.
6. THIS COURT FURTHER ORDERS that:
 - a) Each of the Minister and Canada shall be responsible for one half of the costs awarded by the preceding paragraph of this order (the "Interim Costs");
 - b) The award of Interim Costs made by this order shall be subject to the terms provided for by the order of the Honourable Madam Justice Spies of the Superior Court of Ontario dated January 19, 2007, a copy of which is attached as Schedule B (subject to such changes as are necessary to fit those terms to the costs of these appeals, including the deletion of

paragraphs 15 and 16, which deal with the fees and disbursements of expert witnesses);


- c) In particular, upon the completion of the review of a Bill of Costs and outline by Ontario's Costs Review Counsel (consistent with paragraphs 25-27 of the terms provided for by Justice Spies' order of January 19, 2007), such counsel shall provide a copy of the Bill of Costs and outline to Canada's designate for payment, along with confirmation of Costs Review Counsel's approval of the Undisputed Monthly Claim, and a brief outline identifying any disputed amounts;
- d) The Respondents shall deliver to the Costs Review Counsel for the Minister a budget setting out their estimated partial indemnity costs for these appeals (consistent with paragraph 3 of the terms provided for by Justice Spies' order of January 19, 2007);
- e) The administration of the Interim Costs awarded by this order, including any issue that may arise in relation to the respondents' budget, shall be managed by Madam Justice Spies, *subject to her agreement. K.F. JA.*

7. THIS COURT FURTHER ORDERS that this order is without prejudice to the determination of any issue of law, mixed fact and law, or fact, that has or may be raised on these appeals, or to the determination of any other issue in the action.

8. THIS COURT FURTHER ORDERS that:

- a) This appeal be set down for a hearing commencing in September 2012;
- b) The appellants' factums shall be served before the end of April 2012; and
- c) Further issues regarding the scheduling and management of these appeals may be raised with and resolved by the appeal management judge.

Dated the 7th day of December, 2011



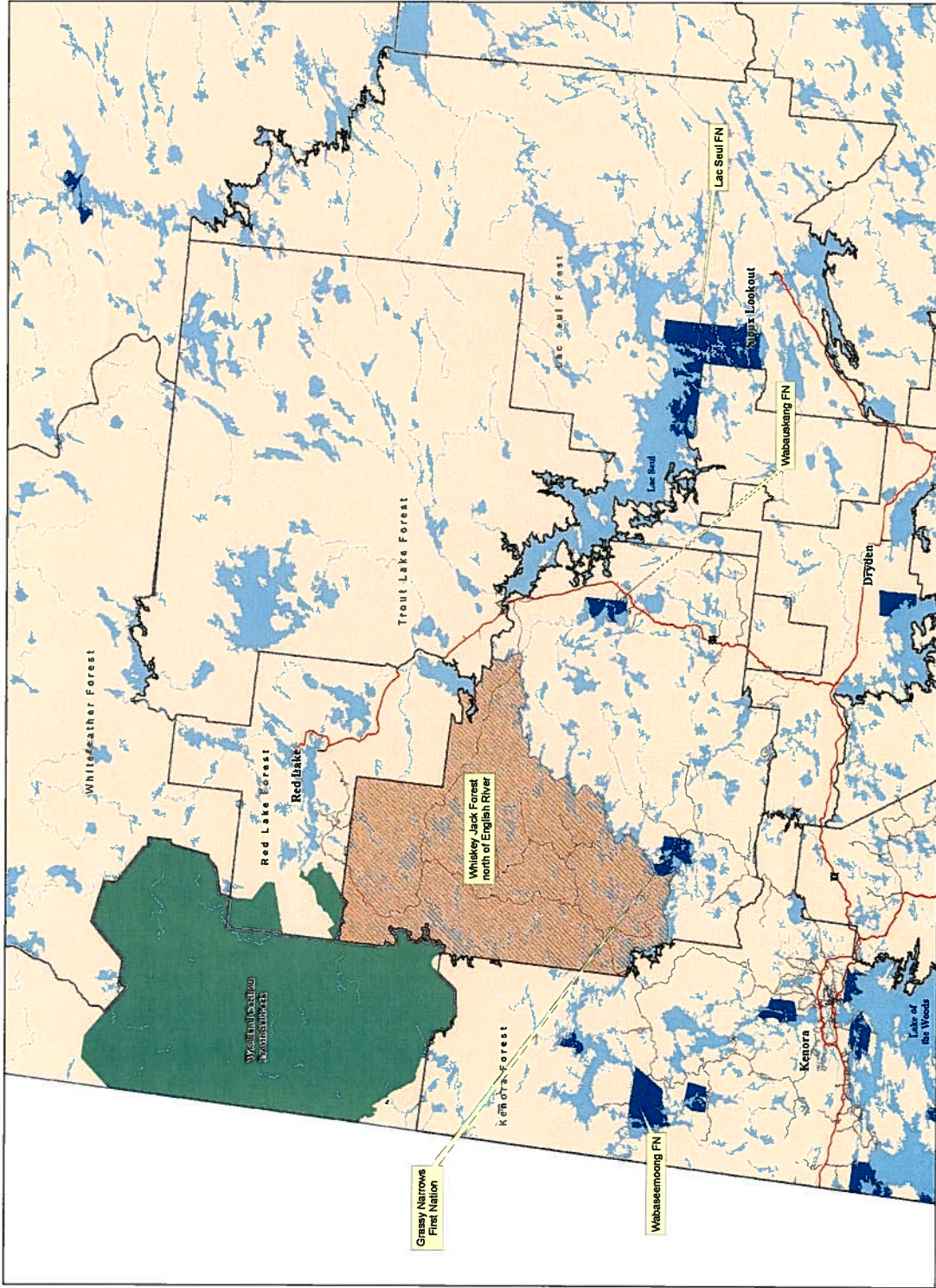
~~The Honourable Justice Feldman, J.A.~~ " ST
SANDRA THEROUDE
DEPUTY REGISTRAR

ENTERED AT / INSCRIPT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC - 7 2011

PER / PAR: ST

Schedule A Whiskey Jack Forest North of English River



Legend

	Whiskey Jack Forest, north of English River
	Forest Management Units
	First Nations
	Woodland Caribou Provincial Park
	Highway
	Primary Forest Roads
	Rivers
	Lakes



Map Produced By: MNR - Regional Operations
Map Information: MNR File # 03/0001/01
Map Date: 2011

Date Produced: November, 2011

Map Projection: Ontario Lambert Conformal Conic, NAD 83

Data Sources: Base Data - MNR
Labels - MNR
Labels - MNR
Labels - MNR

This map product is confidential and submitted for internal use only. It is not to be used as a precise indicator of location. It is not to be used for any purpose other than the purposes for which it was prepared. It is not to be used for any purpose other than the purposes for which it was prepared. It is not to be used for any purpose other than the purposes for which it was prepared.

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Schedule B

Court File No. 05-CV-281875PD

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MADAM)
JUSTICE SPIES) FRIDAY, THE 19th DAY
OF JANUARY, 2007

BETWEEN:

**WILLIE KEEWATIN, ANDREW KEEWATIN Jr., and
JOSEPH WILLIAM FOBISTER on their own behalf and on
behalf of all other member of GRASSY NARROWS FIRST NATION**

PLAINTIFFS

and

MINISTER OF NATURAL RESOURCES

and

ABITIBI-CONSOLIDATED INC.

DEFENDANTS

ORDER

THIS CASE MANAGEMENT CONFERENCE took place on Friday, January 19, 2007.

ON READING the written submissions of the Plaintiffs and of the Defendant Minister of Natural Resources (the "Minister") with respect to further appropriate terms applicable to the order of this court dated May 23, 2007 awarding interim costs to the Plaintiffs (the "Advance Costs Order"), and on hearing the submissions of counsel for the Plaintiffs and for the Minister, and on being advised by counsel of the consent of those parties to certain terms, while certain other proposed terms remained in dispute,

- 1. THIS COURT ORDERS THAT the Advance Costs Order shall be subject to and shall be administered in accordance with the further terms set out in Schedule "A" hereto.**

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SCHEDULE "A"
FURTHER TERMS APPLICABLE TO THE ADVANCE COSTS ORDER

A. COSTS SUBJECT TO ADVANCE COSTS ORDER

1. The Minister of Natural Resources (the "Minister") has been ordered to pay the Plaintiffs' partial indemnity costs of litigating only the Threshold Issues to the conclusion of trial (the "Proceeding"), in advance and in any event of the cause (the "Advance Costs Order"). The Minister is not responsible for the costs of work on issues outside the scope of the Proceeding or for more than a limited amount of client reporting, which shall be subject to a quarterly limit in the Budget (as defined hereinafter). Work such as preparing briefing notes for the Plaintiffs' Band Counsel and preparing written opinions for the clients, shall not be recoverable.

Hourly Rates

2. The hourly rates to be used by the Plaintiffs in calculating costs shall be as agreed by the parties or, failing agreement, as may subsequently be ordered by the Court.

Budget for Plaintiffs' Costs

3. Within sixty (60) days of the close of pleadings, the Plaintiffs shall deliver a detailed budget (the "Budget") covering all anticipated stages of the Proceeding for which advance costs have been ordered.
4. The Budget and any amendments thereto shall be subject to the approval of the Court, and the Minister shall be at liberty to resist such approval or seek amendments to the Budget.
5. For the purposes of the preparation of the Budget, counsel shall discuss the circumstances relevant thereto, including information with respect to expected scope and duration of discovery, numbers of witnesses and length of trial.

6. The Budget may be updated or amended from time-to-time, subject to approval by the Court.
7. The Budget shall include a reasonable estimate of known or reasonably anticipated significant disbursements, such as expert fees and travel and accommodation costs.
8. The Plaintiffs shall advise as soon as reasonably possible if it appears that the Budget for any aspect of the Proceeding will be exceeded. The Minister and any other parties shall advise the Plaintiffs as soon reasonably possible of any change in position or circumstances likely to have a material affect on the Budget.
9. Absent agreement or approval by the Court of an amended Budget, no costs shall be payable with respect to any aspect of the Proceeding in excess of those contemplated by the Budget. A motion for approval of an amended Budget may be made at any time.
10. Notwithstanding the preceding paragraph, the Plaintiffs may reasonably exceed Budget limits for specific line items, provided they remain within the Budget limit on the related heading. For instance, they may exceed the Budget limit on particulars if total claimed costs for pleadings remain within the Budget limit.
11. The Budget shall specify, to the extent reasonably possible, the identity and number of timekeepers who will work on the file and, but for isolated and discreet assignments, the work shall, to the extent reasonably possible, be performed by a core team rather than spread over a large number of timekeepers or a team that varies over time. If new timekeepers are brought on the file, the Minister shall not be responsible for costs associated with educating them about the file.

Costs of Motions

12. Unless ordered otherwise, the Advance Costs Order shall not apply to motions within the Proceeding, or any steps to appeal orders made on such motions. For

greater clarity, it is agreed that to the extent issues arising in the Proceeding are resolved through case management without service of a notice of motion, the Plaintiffs' costs in dealing with such issues are covered by the Advance Costs Order.

Travel Time

13. The Minister shall pay for work on the Proceeding that occurs while a timekeeper is traveling, to the extent the work is performed efficiently and would otherwise be payable. The Minister shall pay for other travel time incurred and reasonably necessary for the Proceeding, at 50% of the rates otherwise recoverable for work on the Proceeding, to a maximum of five (5) hours in any one (1) day.

Recoverable Disbursements

14. Disbursements shall be recoverable only to the extent they are reasonably necessary for the purposes of the Proceeding (as restricted to the Threshold Issues and defined above), reasonable in amount, and recoverable as disbursements under the partial indemnity scale and the Costs Tariff provided for by the Ontario Rules of Civil Procedure.
15. Notwithstanding the immediately preceding paragraph, the Plaintiffs may recover disbursements for retaining an expert to conduct and manage archival research and the collation and collection of archival and academic documents related to the Proceeding, including the preparation of document lists, transcriptions of historical documents and annotations of documents, without the necessity of that expert delivering an expert report.
16. The Plaintiffs shall be permitted to recover disbursements for experts who are retained to prepare for the Proceeding provided that such experts and such disbursements are reasonably required for the purposes of the Proceeding. The Plaintiffs' counsel and Costs Review Counsel shall discuss the appropriateness of retaining proposed experts. If the parties are unable to resolve a dispute in this

regard, either party may apply to the Court for a determination of the reasonableness of the proposed retainer.

17. Where several reasonable options are available with respect to a disbursement, the least expensive alternative shall be used. This principle shall apply only to the extent there is a material difference in costs between different alternatives. Moreover, economy class air travel with Air Canada is acceptable, although the Plaintiffs' counsel shall endeavour to book flights in advance and at reasonable cost. The Plaintiffs' counsel will not be required to fly with a discount airline.
18. Copying Charges:
 - i) In-house copying charges shall not exceed 25 cents per page;
 - ii) Any significant copying shall be done outside the Plaintiffs' counsel's firm at competitive rates; and
 - iii) Copying charges shall be limited to one set of the productions of all parties and the copying of materials for use in Court.
19. Printing charges shall not be recoverable.
20. Per-page fax charges at 25 cents per page shall be recoverable, where they are reasonably necessary for the prosecution of the Proceeding.
21. Recoverable travel, meal and hospitality expenses shall be subject to the Treasury Board Guidelines mandated for federal civil servants.
22. Absent express agreement to the contrary, the Minister shall not pay for work performed by Band members or other related persons.

B. COSTS ADMINISTRATION PROCESS

Costs Review Counsel

23. The Minister shall appoint counsel, who may be a lawyer employed by the Attorney-General of Ontario, to act as Costs Review Counsel for the purpose of administering the Advance Costs Order.
24. The Minister and the Plaintiffs shall agree, and may seek further directions from the Case Management Judge if they are unable to agree, upon provisions which shall ensure that:
- i) Any material provided to the Costs Review Counsel is kept confidential from the counsel having carriage of the litigation on behalf of the Minister, except as may be ordered by the Court or agreed by the parties;
 - ii) Privilege is not waived in respect of materials provided to the Costs Review Counsel.

Documentation and Submission of Costs by the Plaintiffs

25. On a monthly basis, Plaintiffs' counsel shall prepare and deliver to the Costs Review Counsel:
- i) A Bill of Costs based upon the agreed hourly rates and specifying the total amount claimed for the work done in the relevant month (the "Monthly Claim");
 - ii) Any relevant dockets or other supporting materials; and
 - iii) A brief outline, not to exceed three pages, setting out any submissions to be made in respect of the appropriateness of the Monthly Claim.

26. The preparation and presentation of information and back-up documentation to support the claimed costs as provided to Costs Review Counsel (pursuant to the immediately preceding paragraph) is intended to be carried out in a manner that does not create an unreasonable burden for the Plaintiffs or the Minister while ensuring that the claimed costs can be reasonably understood and assessed. Subject to those objectives:

- i) Documentation in support of fees and disbursements shall be sufficiently detailed that the Costs Review Counsel and the Court can readily identify:
 - a) Specifically what work was done and by whom;
 - b) How it relates to the Threshold Issues and the specific sections of the Budget (as discussed herein); and
 - c) Who incurred what disbursements and for what purpose, and how the claimed disbursements relate to the Threshold Issues, the specific sections of the Budget and the Costs Tariff.
- ii) Summaries of fees and disbursements shall be presented to meet these objectives;
- iii) Actual dockets and, if requested, disbursement receipts shall also be submitted, cross-referenced with appropriate coding to the summaries; and
- iv) The Costs Counsel shall be presented with the plaintiffs' docket print-outs for the Proceeding in their entirety. Where items in the dockets are not claimed, the amounts claimed and unclaimed shall be noted, and unclaimed items shall be shown as such.

The Minister's Response to Costs

27. Within forty five (45) days of the receipt of the Bill of Costs and outline, the Costs Review Counsel shall:

- i) Review the Bill of Costs and outline;
- ii) Determine what portion of the Monthly Claim is not disputed (the "Undisputed Monthly Claim");
- iii) Arrange payment of the Undisputed Monthly Claim;
- iv) Unless the whole of the Monthly Claim is paid, provide to Plaintiffs' counsel a brief outline, not to exceed three pages, of why the balance of the Monthly Claim (the "Disputed Monthly Claim") is disputed.

Resolution of Disputed Costs

- 28. Within fifteen (15) days of the delivery of the Minister's Outline, the parties shall discuss the settlement of the Disputed Monthly Claim.
- 29. If the Disputed Monthly Claim is not settled and the Plaintiffs propose to dispute the Minister's outline, the Plaintiffs may, within twenty (20) days of receiving the Minister's outline, submit to the Case Management Judge (or Case Management Master, if so directed) a letter requesting a review, stating the Monthly Claim, the Undisputed Monthly Claim, the Disputed Monthly Claim, and attaching the Bill of Costs, the two outlines, the relevant dockets and other necessary supporting materials.
- 30. If the Plaintiffs submit the Disputed Monthly Claim for review, the Case Management Judge (or Case Management Master) shall review the submitted materials and shall fix the appropriate costs having regard to:
 - i) The factors set out in Rule 57.01(1);
 - ii) The Budget, as described herein;
 - iii) Any term or condition set out herein;

- iv) Any additional factor that may be relevant due to the nature of the Advance Costs Order; and
 - v) Any unreasonable increase in fees or disbursements occasioned by the fact that the Plaintiffs' counsel are located in Victoria, British Columbia.
31. The Advance Costs Order shall not apply to disputes with respect to the Plaintiffs' bills. The costs of such disputes shall be in the discretion of the Court. The parties shall encourage the Court to rule on such costs at the time or shortly after such a dispute is ruled upon. In doing so, the Case Management Judge or Case Management may have regard to any offer to settle that is made. Any such offer to settle shall be provided to the Case Management Judge or Case Management Master in a sealed envelope when the other materials are submitted and any such sealed envelope shall be opened after the determination of the appropriate costs has been made.
32. Any costs order made against the Plaintiffs under the immediately preceding paragraph may be set-off against any outstanding payment pursuant to the Advance Costs Order.
33. Subject to the two immediately following paragraphs, within forty five (45) days of the fixing of costs under paragraph 30 above, the Costs Review Counsel shall arrange the payment of any further amounts that may be necessary in order to satisfy the amount fixed by the Case Management Judge or Case Management Master.
34. Any decision made by the Case Management Judge or Case Management Master shall be subject to appeal or review in accordance with the normal procedures provided by the Rules in this regard.
35. If the Minister appeals an order to pay an amount in respect of costs, the Minister may withhold payment of the amount it has been ordered to pay, or, if that amount

has already been paid, set that amount off against subsequent costs payments, until the final resolution of the appeal in respect of that amount.

Amendment of Terms Applicable to Costs Order

36. These terms shall be open to being amended or supplemented as required, on consent of the Plaintiffs and the Minister, or as otherwise ordered by the Court.

Sandra Sheroude
Deputy Registrar

Appeal Court File No. C54314, *C54326*
Superior Court File No. 05-CV281875PD *C54348*

KEEWATIN, et al - v. - MINISTER OF NATURAL RESOURCES, et al
Plaintiffs Defendants
Third Party

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

ORDER

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